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No. 03-691

# In the Supreme Court of the United States

BENJAMIN EGWAOJE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the court of appeals correctly considered the totality of the circumstances in determining that petitioner knowingly and intelligently waived his right to counsel, rather than requiring that the district court have conducted a specific formal colloquy with petitioner before permitting him to represent himself at trial under *Faretta* v. *California*, 422 U.S. 806 (1975).

2. Whether *Faretta* should be overruled.

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-17a) is reported at 335 F.3d 579.

### JURISDICTION

The judgment of the court of appeals was entered on July 9, 2003. On September 10, 2003, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including November 6, 2003, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of using unauthorized credit cards to

obtain cash advances from different banks in an amount in excess of $1000, in violation of 18 U.S.C. 1029(a)(2), and of attempting to obtain a cash advance with an unauthorized credit card, in violation of 18 U.S.C. 1029(b)(1). He was sentenced to 27 months of imprisonment, to be followed by three years of supervised release, and was ordered to pay $38,985 in restitution. The court of appeals affirmed. Pet. App. 2a-17a.

1. In June and July 2001, petitioner withdrew thousands of dollars in cash from several Chicago-area banks by using credit cards he had obtained through fraudulent means. Petitioner obtained the credit cards by sending fraudulent letters to the credit card issuers in which he requested that the addresses of the legitimate account holders be changed and that new replacement cards be sent to an address effectively controlled by petitioner. Once in possession of the credit cards, petitioner would visit Citibank and Bank One branches in Chicago and request a cash advance by presenting one of the credit cards and some form of fictitious identification. Before his arrest, petitioner obtained a total of $38,985 through such means. Gov't C.A. Br. 2.

On July 17, 2001, petitioner attempted to obtain a cash advance at a Citibank branch. A teller recognized him from prior visits that petitioner had made to the bank to request cash advances under different names. The teller stalled petitioner until the police arrived on the scene. The officers arrested petitioner. At the time of his arrest, petitioner had a fraudulently obtained credit card and fake identification cards in the name of the credit card holder. Gov't C.A. Br. 3.

2. a. On August 15, 2001, a grand jury returned an indictment charging petitioner with two counts of credit card fraud. Petitioner retained counsel. At a

hearing before the district court on November 5, 2001, petitioner's counsel moved to withdraw from the case because petitioner had twice refused to meet with him and "substantial conflicts" had arisen between them. Pet. App. 4a. The district court granted counsel's motion and appointed petitioner counsel from the Federal Defender Panel. *Ibid.*

At the next status hearing on December 7, 2001, petitioner demanded a speedy trial. 12/7/01 Tr. 3. One week later, during a bond hearing, petitioner's counsel discussed the possibility of a plea agreement, but explained that the government's lack of certainty about petitioner's criminal history presented an impediment. 12/14/01 Tr. 5. On December 21, 2001, the parties returned to court and discussed the sentencing guidelines that would likely apply to the case. The government informed the court that petitioner had three prior convictions, but petitioner contended that only two of his prior convictions should be counted for purposes of calculating his criminal history points. 12/21/01 Tr. 9-10. After the district court recommended to petitioner's counsel that he should consider a "disposition[] short of a trial," *id.* at 10, petitioner stated that he would not accept a plea bargain and that he was ready for trial, *id.* at 11.

On February 6, 2002, five days before the scheduled trial date, petitioner's second counsel moved to withdraw from the case. Counsel explained that petitioner was refusing to meet or cooperate with him to prepare for trial. 2/6/02 Tr. 2-3. After petitioner complained that counsel had told him he lacked a viable defense and stated that he wanted a lawyer who would "represent[]" him at trial, the district court allowed counsel to withdraw and agreed to appoint petitioner his third lawyer. *Id.* at 3-4. The court informed petitioner that,

while it would "appoint a lawyer who will represent you[,] [t]his does not mean I will appoint a lawyer who agrees with you. I will not necessarily appoint a lawyer whose professional judgment believes there is a defense." *Id.* at 5.

The district court rescheduled the trial date to April 2, 2002, to allow petitioner's newly appointed counsel sufficient time to prepare. When that day arrived, petitioner told the district court that counsel "is not going to be my lawyer," 4/2/02 Tr. 3, and that "I am going to go *pro se*," *id.* at 4. Petitioner then requested 60 additional days to prepare for trial. *Id.* at 3-4. The court denied petitioner's request for a continuance, stating:

> I have set the schedule. I have seen in you a course of conduct that has been nothing but an attempt to frustrate the government's effort to bring you to trial, to play games, to demand a speedy trial, and then to demand a continuance. This is your third lawyer.

*Id.* at 4.

The district court informed petitioner that he had the right to proceed as his own lawyer, but "strongly advise[d]" him against doing so. 4/2/02 Tr. 4. The court explained:

> If you wish to proceed *pro se*, you are entitled to do so. The United States Constitution guarant[ees] your right to proceed as your own lawyer. If you wish to proceed as your own lawyer, I am required to admonish you. Even if I weren't required, I would admonish you that to represent yourself in any criminal case is a foolish act. You will almost certainly make significant tactical errors. You will almost certainly put yourself in a position where even if you had a lawful defense, you would be

> unable to present it in a coherent way. On top of it, you will not, I think, adequately preserve the record in this case if error has been made. So I strongly advise you against representing yourself. But I do tell you that that is your decision. You may choose to represent yourself, or you may choose to have Mr. Halprin represent you. The choice is yours.

*Id.* at 4-5. After the court advised petitioner again that proceeding *pro se* "is a foolish thing to do," *id.* at 6, petitioner reaffirmed that he would represent himself, *id.* at 7. The court appointed petitioner's former counsel as standby counsel. *Ibid.*

b. At trial, the government called several witnesses, including the police officer who arrested petitioner and found false identifications on his person; the Citibank teller from whom petitioner had attempted to get cash advances under the names of Grant Abbott, Hugh Ball, and Eugene Kientzy; and Abbott and Kientzy, whose identities petitioner had stolen. The government also introduced bank surveillance photos of petitioner standing at teller counters as he tried to obtain cash in the names of his victims. Petitioner presented no witnesses or evidence in his defense. He was convicted on both counts. Pet. App. 8a.

c. Petitioner filed a number of post-trial motions, which the district court treated as a request for a new trial. Pet. App. 8a. The court denied petitioner's request, finding, *inter alia*, that: (1) petitioner "understood that there was, in fact, no practical defense" to the charges, 6/26/02 Tr. 11, and "knew from the beginning that no lawyer could help him because no lawyer could make a defense or an attack on the evidence in this case," *id.* at 12; (2) petitioner falsely attempted "to portray himself as badly served by counsel," *id.* at 11;

(3) petitioner falsely demanded a speedy trial, seeking in reality "to forestall the day of reckoning because the longer he waited for trial the longer he remained in the United States," *id.* at 12; (4) petitioner's "decision to proceed *pro se* was knowing and voluntary," as he "fully understood the risk[s] of going to trial without counsel[,] and he assumed them in the hope that jury sympathy or appellate review would somehow save him," *id.* at 13; and (5) petitioner sought to "manipulate[] the system to [his] own benefit," *id.* at 14.

3. The court of appeals affirmed. Pet. App. 2a-17a. The court of appeals rejected petitioner's contention that the district court erred in permitting him to proceed *pro se*, concluding that petitioner "made a knowing and intelligent waiver of his right to counsel when he elected to represent himself at trial." *Id.* at 13a. In so finding, the court recognized at the outset of its analysis that "the Supreme Court has cautioned that a defendant 'should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.'" *Id.* at 9a (quoting *Faretta* v. *California*, 422 U.S. 806, 835 (1975)).

The court of appeals emphasized that the determination whether a defendant has made a knowing and intelligent waiver "at all times is directed to the record as a whole." Pet. App. 10a. In addition, the court identified several factors it takes into account in evaluating whether a waiver was knowing and intelligent: "(1) whether and to what extent the district court conducted a formal hearing into the defendant's decision to represent himself, (2) whether there is other evidence in the record that establishes that the defendant understood the disadvantages of self-representation, (3) the background and experience of the defendant,

and (4) the context of the defendant's decision to proceed *pro se*." *Id.* at 9a-10a (quoting *United States* v. *Avery*, 208 F.3d 597, 601 (7th Cir. 2000)). Observing that "[t]his is not a formalistic, mechanical approach," *id.* at 10a, the court of appeals emphasized that "[r]egardless" of "these individual factors," the "inquiry at all times is directed to the record as a whole," *ibid.*[1]

After examining "the totality of circumstances surrounding [petitioner's] purported waiver," the court of appeals held that the waiver of counsel "was made knowingly and intelligently." Pet. App. 11a. The court found first that "there is no question that the [district] court satisfied its obligation to warn [petitioner] of the dangers of self-representation," noting that the court told petitioner that self-representation was "a foolish act that was likely to result in significant errors at trial." *Ibid.* The court found next that the record lacked any suggestion that petitioner "was incapable of understanding" the district court's "repeated warnings." *Ibid.* As the court explained, petitioner graduated high school and attended two years of college, he succeeded in temporarily defrauding banks of nearly $39,000, and he was "no stranger to the criminal justice system." *Ibid.*

The court of appeals further found that "[t]he strongest evidence supporting a finding of waiver * * * is that which suggests that [petitioner] was deliberately manipulating the system in an attempt to create an appealable issue." Pet. App. 12a. In so concluding, the

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[1] The court stated that, although a district judge may "conduct a thorough and formal inquiry into the defendant's understanding of the court's warnings," the court's "attention ultimately is directed not at what was said or not said to the defendant but whether that defendant in fact understood the risks and made a knowing and intelligent waiver." Pet. App. 10a.

court credited the district court's findings that petitioner "engaged in a pattern of obfuscation and obstructionism in his pretrial dealings with the court," and that petitioner's misconduct was his "only practical defense to charges that were so well supported by the evidence as to be indefensible on their merits." *Ibid.* The court therefore "concur[red] with the district court that [petitioner] fully understood the risk of going to trial without counsel." *Id.* at 13a.

The court of appeals also rejected petitioner's "fallback position" that the district court should have precluded him from proceeding *pro se* because he lacked the ability to conduct the trial effectively. Pet. App. 13a. The court held that, under *Godinez* v. *Moran*, 509 U.S. 389, 399 (1993), petitioner's competence to represent himself is irrelevant to the question whether he executed a proper waiver of his right to counsel. *Ibid.*

**ARGUMENT**

Petitioner challenges the court of appeals' conclusion that he knowingly and voluntarily waived his right to counsel at trial. In particular, petitioner argues that the "warning that [he] received was inadequate to enable him knowingly and intelligently to waive his right to counsel." Pet. 16. That contention is incorrect, and further review is not warranted in this case.

1. a. In *Faretta* v. *California*, this Court held that the Sixth Amendment guarantees a criminal defendant the right to forgo counsel and conduct his own defense. Because a defendant who represents himself "relinquishes * * * many of the traditional benefits associated with the right to counsel," a defendant seeking to proceed *pro se* "must 'knowingly and intelligently'" waive that right. 422 U.S. at 835 (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464-465 (1938)). To ensure that an

election to forgo counsel satisfies that standard, the Court stated that a defendant who is contemplating proceeding *pro se* "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Ibid.* (quoting *Adams* v. *United States*, 317 U.S. 269, 279 (1942)). In *Faretta*, this Court found that the defendant had validly waived his right to counsel, where the defendant "clearly and unequivocally" expressed a desire to proceed *pro se*; the record showed that he was "literate, competent, and understanding"; and the trial judge had warned him "that he thought it was a mistake not to accept the assistance of counsel, and that [the defendant] would be required to follow all the 'ground rules' of trial procedure." *Id.* at 835-836.

b. Although it is well-established that a defendant may not relinquish his right to counsel under the Sixth Amendment unless the record establishes that he knowingly and intelligently waived it, courts of appeals have taken somewhat different approaches in ensuring that a defendant's waiver is knowing and intelligent.

The majority of courts of appeals, including the Seventh Circuit, have concluded that while it may be generally advisable for district courts to conduct particularized record inquiries in determining whether a defendant is aware of the dangers of self-representation, the determination whether a defendant knowingly and intelligently waived his right to counsel ultimately should be based on the record as a whole, rather than a formalistic inquiry into "what was said or not said to the defendant." Pet. App. 10a; see also, *e.g.*, *United States* v. *Turner*, 287 F.3d 980, 982-984 (10th Cir. 2002); *United States* v. *Singleton*, 107 F.3d 1091, 1098-1099 (4th Cir.), cert. denied, 522 U.S. 825 (1997);

*United States* v. *Stewart*, 20 F.3d 911, 917 (8th Cir. 1994); *United States* v. *Campbell*, 874 F.2d 838, 845-847 (1st Cir. 1989); *United States* v. *Tompkins*, 623 F.2d 824, 827-829 (2d Cir. 1980).

Some circuits have required a district court to conduct an on-the-record inquiry into a defendant's awareness of the risks of self-representation. See, *e.g.*, *United States* v. *Stubbs*, 281 F.3d 109, 118 (3d Cir. 2002) (district court "should only accept a waiver [of the right to counsel] after making a searching inquiry sufficient to satisfy the court that the defendant's waiver was understanding and voluntary."); *United States* v. *Bailey*, 675 F.2d 1292, 1300-1301 (D.C. Cir.) (calling on district courts to "mak[e] clear on the record the awareness by defendants of the dangers and disadvantages of self-representation as to which the Supreme Court in *Faretta* has voiced its concern"), cert. denied, 459 U.S. 853 (1982).

The Sixth Circuit, on which petitioner places principal reliance (see Pet. 10-12, 16), has gone a step further and held that district courts should follow the "model inquiry" in the Federal Justice Center, *Bench Book for United States District Judges* (4th ed. 1996) before accepting a defendant's waiver of his right to counsel. *United States* v. *McDowell*, 814 F.2d 245, 249-250 (6th Cir.), cert. denied, 484 U.S. 980 (1987). In *McDowell*, however, the Sixth Circuit did not hold that such an inquiry was compelled by the Sixth Amendment. The district court in *McDowell* did not engage in the sort of "model inquiry" that the Sixth Circuit—in invoking its "supervisory powers"—ruled should be conducted by district courts in "future" cases. *Ibid.* Nonetheless, the court of appeals in *McDowell* held that "a fair reading of the record as a whole" established that the defendant knowingly and intelligently waived his right to counsel,

and therefore rejected the defendant's Sixth Amendment argument on appeal. *Id.* at 249.

c. The fact that some courts of appeals have taken different approaches in giving effect to *Faretta* does not support the petition for certiorari in this case. All the circuits recognize that this Court's decision in *Faretta* establishes that a defendant "should be made aware of the dangers * * * of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" 422 U.S. at 835. Although courts have called for different approaches in determining whether a defendant's waiver of his right to counsel is made with "eyes open," this Court's decision in *Faretta*—and the Sixth Amendment to the Constitution—is being faithfully applied in every circuit, including the Seventh Circuit.

Moreover, even assuming the divergence of authority in the lower courts warranted consideration by this Court, this case would be an ill-suited vehicle in which to address it. As the court of appeals concluded, the record conclusively establishes that petitioner's waiver of his right to counsel was knowing and intelligent. See Pet. App. 11a-13a. Indeed, here, as in *Faretta*, the record establishes that the defendant "clearly and unequivocally declared to the trial judge that he wanted to represent himself"; the record establishes that the defendant was "literate, competent, and understanding"; and the record establishes that "[t]he trial judge * * * warned [the defendant] that he thought it was a mistake not to accept the assistance of counsel." *Faretta*, 422 U.S. at 835-836; see Pet. App. 12a-13a.

While in the Sixth Circuit a district court would have been required to engage in a more formulaic inquiry in warning a defendant of the hazards of self-representation, the record in this case leaves no reasonable doubt

that the command of *Faretta* was fulfilled. The district court advised petitioner of "the dangers and disadvantages of self-representation," and petitioner chose to proceed *pro se* "with eyes open." *Faretta*, 422 U.S. at 835. As discussed above, the district court "strongly advise[d]" petitioner against forgoing counsel; told him that self-representation "in any criminal case is a foolish act"; warned him that he would "almost certainly make significant tactical errors"; warned him that, even if he "had a lawful defense," he "almost certainly" would fail "to present it in a coherent way"; and warned that, "[o]n top of it, you will not, I think, adequately preserve the record in this case if error has been made." 4/2/02 Tr. 4-5. During the same hearing, the court reiterated that proceeding *pro se* would be "a foolish thing to do." *Id.* at 6. Accordingly, the record in this case firmly supports the lower courts' findings that petitioner knowingly and voluntarily waived his right to counsel.

d. This case is an unsuitable vehicle to review the conflict alleged by petitioner for an even more fundamental reason. Apart from any obligation to warn a defendant about the dangers of self-representation in any particular or formalistic manner, it is well-established that a defendant may not use the Sixth Amendment right of self-representation to manipulate the trial system. See *Faretta*, 422 U.S. at 834-835 & n.46 ("The right of self-representation is not a license to abuse the dignity of the courtroom."); *United States* v. *Frazier-El*, 204 F.3d 553, 560 (4th Cir. 2000) ("The right [to self-representation] does not exist * * * to be used as a tactic for delay; for disruption; for distortion of the system.") (citations omitted).

Similarly, most lower courts have recognized that a district court may infer that a defendant has knowingly and intelligently waived his right to counsel when the

court finds that the defendant seeks to discharge his attorney in order to delay or to sabotage the trial. See, *e.g.*, *Cordova* v. *Baca*, 346 F.3d 924, 929 (9th Cir. 2003) ("[M]anipulation presupposes knowledge and an ability to work around the rules, and a defendant who knows enough to manipulate will very likely be one whose waiver will be deemed voluntary, despite any defect in the admonitions given by the court."); see also *Nelson* v. *Alabama*, 292 F.3d 1291, 1297-1298 (11th Cir. 2002) (citing *Fitzpatrick* v. *Wainwright*, 800 F.2d 1057, 1068 (11th Cir. 1986)); *United States* v. *Irorere*, 228 F.3d 816, 826-828 (7th Cir. 2000); *United States* v. *Kneeland*, 148 F.3d 6, 11 (1st Cir. 1998); *United States* v. *Kelm*, 827 F.2d 1319, 1322 (9th Cir. 1987); *McQueen* v. *Blackburn*, 755 F.2d 1174, 1178 (5th Cir.), cert. denied, 474 U.S. 852 (1985); cf. *Buhl* v. *Cooksey*, 233 F.3d 783, 796 (3d Cir. 2000).[2] In addition, some lower courts have found that, when a defendant moves for self-representation in order to delay or manipulate the trial, the district court may find that the defendant waived his right to counsel without conducting a *Faretta* inquiry. *United States* v. *Hughes*, 191 F.3d 1317, 1323-1324 (10th Cir. 1999), cert. denied, 529 U.S. 1022 (2000).

As the court of appeals emphasized, the district court in this case found that petitioner sought to deliberately manipulate the system by engaging in "a pattern of obfuscation and obstructionism." Pet. App. 12a. Those findings are "entitled to deference on appeal," *ibid.*, and by this Court. And the findings in themselves "support

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[2] In *Buhl*, the Third Circuit concluded that there were no "dilatory motives" on the part of defendant, but nonetheless went on to state, in dicta, that "we do not suggest that a finding of such motives would negate the court's duty to inquire under *Faretta*." 233 F.3d at 796.

a conclusion that [petitioner] knew full well what he was doing when he asked to proceed *pro se*." *Ibid.*[3] The conclusive record evidence that petitioner sought to deliberately manipulate the system is sufficient reason to deny the petition for certiorari in this case.

2. Petitioner also suggests (Pet. 16-26) that the petition should be granted so that the Court may revisit *Faretta*. That contention also should be rejected.

This Court has on several occasions reaffirmed its decision in *Faretta*. In *McKaskle* v. *Wiggins*, 465 U.S. 168, 173-174 (1984), the Court reaffirmed the rule announced in *Faretta*, while holding that the Constitution does not vest the defendant with an absolute right to preclude the participation of standby counsel. See *id.* at 176-188. In *Godinez* v. *Moran*, 509 U.S. 389, 399-400 (1993), the Court again reaffirmed *Faretta*. In *Martinez* v. *Court of Appeal of California*, 528 U.S. 152 (2000), this Court held that the Constitution does not vest criminal defendants with a right to represent themselves *on appeal*. The Court held that the justifications for the *Faretta* rule either do not apply at all, or apply with significantly reduced force, to the appellate phase of criminal proceedings. See *id.* at 156-162. But *Martinez* did not concern the right of self-representation *at trial* and, therefore, did not affect the continuing vitality of *Faretta* with regard to the right of self-representation at trial. Nor is there any evidence in the decision below or other cases that the courts of

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[3] As the court of appeals explained, the district court's findings that petitioner sought to deliberately manipulate the system were corroborated by its conclusion that "this conduct was [petitioner's] only practical defense to charges that were so well supported by the evidence as to be indefensible on their merits." Pet. App. 12a; see *id.* at 14a-15a (discussing the "overwhelming evidence" of petitioner's guilt).

appeals are laboring in any "lingering uncertainty about the validity of *Faretta* in the wake of * * * *Martinez*." Pet. 23.

Petitioner provides no persuasive reason for the Court to reconsider *Farretta*, much less to do so in a case, such as this, in which the lower courts found that the defendant sought to deliberately manipulate the system by *invoking* his right to self-representation, Pet. App. 12a, and in which there was "overwhelming evidence" of the defendant's guilt, *id.* at 14a.[4] Petitioner claims (Pet. 25) that he did not perform as an effective advocate at trial, and that as a result his conviction was unfairly obtained. The court of appeals correctly rejected that argument, however, when petitioner framed it as "a denial of his due process right to a fair trial." See Pet. App. 13a-15a.[5]

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[4] Petitioner contends (Pet. 24 & n.5) that permitting self-representation will undermine confidence in the criminal justice system, citing the prosecution of Zacarias Moussaoui as an example of self-representation run amok. But "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct," *Faretta*, 422 U.S. at 834 n.46, as the district court in the Moussaoui case did on November 14, 2003.

[5] Petitioner asserts (Pet. 25) that, while he "may have been competent to stand trial"—and thus competent to waive his right to counsel under *Godinez*—"it was clear" that "he was unlikely to be able to mount a competent *defense*." But the district court found that "even with the best lawyer the result would have been the same," 6/26/02 Tr. 13, because petitioner did not have a viable defense, *id.* at 11; see also Pet. App. 14a-15a. In addition, as the court of appeals explained, petitioner's educational background and experience with the criminal justice system (see 12/21/01 Tr. 9-10) belie the notion that he was incapable of conducting his own defense, albeit not with the skill of a trained attorney.

3. There is no reason to hold this petition pending the disposition in *Iowa* v. *Tovar*, No. 02-1541 (argued Jan. 21, 2004). *Tovar* involves the waiver of the right to counsel by a defendant who pleaded guilty. As petitioner himself acknowledges (Pet. 27), the Court's decision in *Tovar* is unlikely to "address the requirements for waiver of the right to counsel *at trial*, much less the ongoing validity of the right to *self-representation* at trial." In addition, in its amicus brief in *Tovar*, the United States has argued that substantially different standards should apply to the waiver of counsel at trial and the waiver of counsel for purposes of entering a guilty plea. Regardless of what standards govern a defendant's waiver of counsel at the *plea stage*, those standards could not affect the validity of petitioner's conviction in this case. Petitioner retained the assistance of counsel at the plea stage and declined to plead guilty.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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